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February 16, 2000

HAND DELIVERED

Magalie Roman Salas  
Secretary, Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

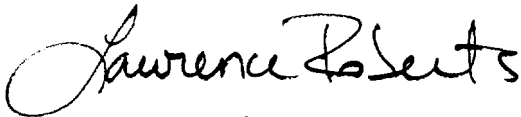
Re: Comments of NEXTLINK Communications, Inc., CC Docket No. 98-184

Dear Ms. Salas:

Attached is the Motion to Timely Filed on February 15, 2000, comments on behalf of NEXTLINK Communications, Inc. in the above-captioned docket.

Very truly yours,

Davis Wright Tremaine LLP



Lawrence Roberts

LR/bw

Enclosures

No. of Copies rec'd 014  
List A B C D E

February 16, 2000

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cc:

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
GTE CORPORATION,	)	
	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
	)	
Transferee,	)	
	)	
For Consent to Transfer of Control	)	

**MOTION TO ACCEPT THE FILING AS TIMELY FILED**

On February 15, 2000, the Electronic Comment Filing System failed to accept comments filed by the law firm Davis Wright Tremaine LLP on behalf of NEXTLINK Communications, Inc., in the above-captioned matter. We attempted to file the comments repeatedly between 7:00 p.m. and 11:00 p.m., using both the secured and unsecured links and both Netscape and Explorer browser programs. The error message we received was: "Application Error(s) Only 0 bytes(s) were received. Comment must contain at least 5 bytes for acceptance into ECFS". We properly attached the comments as a Word 97 file to the cover sheet. Attached are printed copies of some of the Application Error messages we received.

We respectfully request that the Commission grant this Motion and accept as timely filed on February 15, 2000 the attached original and four copies of the comments of NEXTLINK Communications, Inc.

Respectfully submitted,

Daniel M. Waggoner (12)

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Counsel for NEXTLINK Communications,  
Inc.

Dated: February 16, 2000



**Federal Communications Commission**

## Application Error(s)

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*updated 03/25/98*



**Federal Communications Commission**

## Application Error(s)

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*updated 03/25/98*

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
GTE CORPORATION,	)	
	)	
Transferor,	)	
	)	
and	)	CC Docket No. 98-184
	)	
BELL ATLANTIC CORPORATION,	)	
	)	
Transferee,	)	
	)	
For Consent to Transfer of Control	)	

**COMMENTS OF NEXTLINK COMMUNICATIONS, INC.**

Pursuant to Public Notice DA 00-165 issued by the Federal Communications Commission (the "Commission") on January 31, 2000,<sup>1</sup> NEXTLINK Communications, Inc. ("NEXTLINK") hereby submits its comments in opposition to the Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE") proposal to transfer the Internet backbone and related assets of GTE Internetworking ("GTE-I") to a corporation owned and operated independently of the merged Bell Atlantic/GTE entity as outlined in the Supplemental Filing of Bell Atlantic and GTE in the above-captioned docket.<sup>2</sup>

Rather than open the Bell Atlantic local markets to competition in order to obtain in-

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<sup>1</sup> Public Notice, Commission Seeks Comment on Supplemental Filing Submitted by Bell Atlantic Corporation and GTE Corporation, CC Docket No. 98-184, DA 00-165 (rel Jan. 31, 2000).

<sup>2</sup> See *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer of Control*, CC Docket No. 98-184, Supplemental Filing of Bell Atlantic and GTE (filed Jan. 27, 2000) ("Supplemental Filing").



region, interLATA authority, as required by the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the “Act”), Bell Atlantic and GTE propose to create a spin-off corporation (“DataCo”) comprised of the Internet backbone and related assets of GTE-I. For the reasons detailed below, NEXTLINK finds the proposed spin-off to be unacceptable because it violates the requirements of Section 271 of the Act and reduces the incentives of the merged entity to open its markets to competition. As proposed by Bell Atlantic and GTE, the transfer would permit the merged entity to maintain unlawful control over DataCo. The Commission should reject a proposal so clearly intended to circumvent the Act.

**I. THE PROPOSED CREATION OF DATACO REPRESENTS ANOTHER EFFORT BY BELL ATLANTIC TO AVOID ITS MARKET-OPENING OBLIGATIONS UNDER THE ACT**

Section 271 of the Act restricts Bell Atlantic and any Bell Atlantic affiliate from providing interLATA services in any part of a state in which Bell Atlantic or an affiliate was providing “wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree.”<sup>3</sup> Further, the Commission has consistently held that the restrictions of Section 271 apply to advanced telecommunications services like those offered by GTE Internetworking.<sup>4</sup>

Since the passage of the Act in 1996 – and with particular zeal in the past two years – Bell Atlantic has attempted through various petitions and filings to avoid the procompetitive

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<sup>3</sup> 47 U.S.C. §§ 271(b)(1), 271(i)(1).

<sup>4</sup> See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, and Notice of Proposed Rulemaking (“*Advanced Services Order*”) (rel. Aug. 7, 1998) ¶¶ 35-37.

mandates of the Act. For example, under the guise of promoting the deployment of advanced telecommunications services pursuant to Section 706, Bell Atlantic petitioned the Commission to grant, among other relief, forbearance from Section 271.<sup>5</sup> In a subsequent attempt to gain relief from the market-opening obligations of Section 271, Bell Atlantic petitioned the Commission to waive LATA boundary restrictions with respect to advanced telecommunications services in the Bell Atlantic region.<sup>6</sup> The Commission denied Bell Atlantic's petitions and, in its *Advanced Services Order*, determined that it lacks authority to forbear from applying Section 271 to a Bell Operating Company's ("BOC's") provision of advanced telecommunications services.<sup>7</sup>

Following the submission of its merger petition, which contained an explicit yet enigmatic request for "transitional" relief from Section 271, Bell Atlantic attempted to obtain relief from Section 271 with an *ex parte* filing in February 1999.<sup>8</sup> In that *ex parte* letter, Bell Atlantic and GTE attempted to explain their request for "transitional" relief from Section 271. Bell Atlantic and GTE explained that the requested relief would become effective throughout the Bell Atlantic region only after Bell Atlantic secured in-region, interLATA authority for more than one-quarter of its access lines. Because thirty (30%) percent of Bell Atlantic's access lines are located in New York, under Bell Atlantic's transitional relief proposal, Bell Atlantic would receive complete relief from Section 271 throughout its region as soon as it received Section 271

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<sup>5</sup> See *Petition of Bell Atlantic for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11.

<sup>6</sup> See *Emergency Petition of Bell Atlantic-West Virginia for Authorization to End West Virginia's Bandwidth Crisis*, NSD-L-98-99 (filed July 22, 1998).

<sup>7</sup> See *Advanced Services Order*, ¶ 82 ("Under section 10(d), we may not use that authority to forbear from applying the requirements of . . . 271 prior to their full implementation.").

<sup>8</sup> See Bell Atlantic-GTE *ex parte* letter dated February 24, 1999, from Steven G. Bradbury, Counsel for GTE, and Michael E. Glover, Counsel for Bell Atlantic, to Thomas Krattenmaker.

authority in New York<sup>9</sup> The previous proposal for transitional relief was so flawed, however, that Bell Atlantic and GTE requested the Commission place its merger on hold while Bell Atlantic continued its efforts to obtain Section 271 authority in New York and attempted to create a more acceptable proposal.<sup>10</sup> Now, nine months after their last proposal failed to garner any support, Bell Atlantic and GTE submit their new proposal to create DataCo. The proposed corporate creation – nothing more than a sham transaction – is as flawed as the previous requests for relief.

## **II. UNDER THE INSTANT PROPOSAL, DATACO MUST BE CONSIDERED AN AFFILIATE OF BELL ATLANTIC**

Rather than comply with the marketing-opening requirements of Section 251 of the Act to obtain Section 271 authority from the Commission, Bell Atlantic and GTE present the Commission with a sham stock transaction that purports to comply with Section 271. By creating a separate DataCo entity, Bell Atlantic hopes to avoid the Section 271 issues that threaten to unravel its merger with GTE. Under the proposal, however, DataCo must be considered an affiliate of Bell Atlantic. As a result, the Commission should reject the proposal as contravening the procompetitive requirements of Section 271 of the Act.

With respect to BOCs, the Act defines an “affiliate” as “a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership with

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<sup>9</sup> Bell Atlantic has since received Section 271 authority to provide in-region, interLATA service in New York. *See In re Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order (rel. Dec. 22, 1999).

<sup>10</sup> *See* Bell Atlantic-GTE *ex parte* letter dated April 14, 1999, from Steven G. Bradbury, Counsel for GTE, and Edward D. Young, III, Counsel for Bell Atlantic, to Katherine Brown.

another person.”<sup>11</sup> Further, the Act and the Commission’s rules and regulations provide that the term “own” means “to own an equity interest (or the equivalent thereof) of more than 10 percent.”<sup>12</sup>

In their Supplemental Filing, Bell Atlantic and GTE explain that GTE will transfer substantially all of GTE-I’s existing nationwide data business into the newly created DataCo, which will be publicly owned and controlled.<sup>13</sup> Bell Atlantic and GTE note further that the stock in DataCo will be divided into Class A common stock and Class B preferred stock. According to Bell Atlantic and GTE, Class A stock will possess ninety (90%) percent of the voting rights and will receive ninety (90%) percent of any dividends or distributions. Class B stock, which will be owned by the merged Bell Atlantic/GTE entity, will possess ten (10%) percent of the voting rights and will receive ten (10%) percent of any dividends or distributions. Once Bell Atlantic receives “sufficient interLATA relief to operate” DataCo, the merged Bell Atlantic/GTE entity will have the right to convert its Class B shares into shares that will represent eighty (80%) percent of the outstanding shares following conversion.<sup>14</sup>

Although the proposal to create DataCo, as superficially described by Bell Atlantic and GTE, might appear on its face to comply with the ten (10%) percent ownership limitation applicable to BOCs, underlying voting rights and control mechanisms given to the Class B

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<sup>11</sup> See 47 U.S.C. § 153(1); *see also* 47 C.F.R. § 53.5.

<sup>12</sup> *Id.*

<sup>13</sup> See Supplemental Filing at 32. In addition, it is worth noting that Bell Atlantic and GTE do not explain what is meant by the phrase “substantially all” of GTE-I’s existing nationwide data business.

<sup>14</sup> *Id.*

shareholders – Bell Atlantic and GTE – provide Bell Atlantic and GTE with control and powers that exceed the ten (10%) percent limitations imposed by the Act. Under the proposal, the merged Bell Atlantic/GTE entity will have the right to convert its Class B shares into “shares that will represent 80% of the outstanding shares following conversion.”<sup>15</sup> Bell Atlantic and GTE state cryptically that conversion will occur after the merged entity “receives sufficient interLATA relief” to operate DataCo.<sup>16</sup> Such ambiguous phrasing resembles Bell Atlantic’s and GTE’s initial merger filing, in which they stated that Bell Atlantic should receive “transitional” relief from Section 271.<sup>17</sup> In a subsequent filing, Bell Atlantic and GTE clarified their request and explained transitional relief to mean complete relief from Section 271 following Bell Atlantic’s receipt of Section 271 authority for twenty-five (25%) percent of its access lines.<sup>18</sup> The ambiguous language in the Supplemental Filing – “receives sufficient interLATA relief” – should alert the Commission to expect from Bell Atlantic and GTE a new request for relief from Section 271 well before any acceptable “conversion” date.

With the spirit and substance of the Act hanging in the balance, the Commission must evaluate the proposed transaction and Bell Atlantic’s statutory limitations and competitive obligations in order “to determine the nature of the activities that Congress intended be prohibited.”<sup>19</sup> In denying previous requests for relief from regulatory obligations, the

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<sup>15</sup> Supplemental Filing at 32.

<sup>16</sup> *Id.* at 32.

<sup>17</sup> See *GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer of Control*, CC Docket No. 98-184 (filed Oct. 2, 1998).

<sup>18</sup> See *supra* n.8.

<sup>19</sup> See *AT&T, et al., v. Ameritech and Qwest, AT&T, et al., v. U S WEST and Qwest, and McLeodUSA, et al., v. U S WEST*, File Nos. E-98-41, E-98-42 and E-98-43, Memorandum

Commission has stated that it will not grant requests that are merely attempts to “eviscerate section 271 and circumvent the pro-competitive incentives for opening the local markets to competition that Congress sought to achieve in enacting section 271 of the Act.”<sup>20</sup> Similarly, the Commission should not permit Bell Atlantic to follow through with the sham proposal to create DataCo, because the effort is clearly designed to avoid Section 271 obligations.

Bell Atlantic and GTE contend that the transaction they have designed for the creation of DataCo resembles several transactions previously approved by the Commission.<sup>21</sup> These transactions, however, were not proposed within the context of Section 271. Bell Atlantic’s and GTE’s reliance upon Commission approval of such transactions only serves to cloud the main issue: through this transaction and the creation of DataCo, Bell Atlantic will be able to avoid its market-opening obligations required by the Act. The examples and Commission decisions cited by Bell Atlantic and GTE therefore are of only limited relevance in light of the clear congressional intent underlying the procompetitive mandates of Section 271 of the Act.

Under the spin-off corporation proposal, Bell Atlantic and GTE will, in fact, exert control much greater than warranted by the merged entity’s supposedly limited ownership of ten (10%) percent of DataCo. As noted above, the Act defines an “affiliate” as “a person that (directly or indirectly) owns *or controls*, is owned or *controlled by*, or is under common ownership with another person.”<sup>22</sup> Bell Atlantic and GTE misleadingly cite to Commission-approved

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Opinion and Order, FCC 98-242 (“*Qwest Order*”) (rel. Sept. 28, 1998) ¶ 24.

<sup>20</sup> *Advanced Services Order*, ¶ 82.

<sup>21</sup> *See* Supplemental Filing at 34-55.

<sup>22</sup> *See* 47 U.S.C. § 153(1) (emphases added); *see also* 47 C.F.R. § 53.5.

transactions that focus on nonvoting interests and clear-cut ownership interests.<sup>23</sup> In the instant case, the proposed ownership interest in DataCo is not clear-cut. The Commission should carefully review the economic interest and power that Bell Atlantic and GTE will retain over DataCo which are far greater than the mere ten (10%) percent ownership interest alleged by Bell Atlantic and GTE.<sup>24</sup> For example, the conversion right proposed by Bell Atlantic and GTE has several features that contradict any notion of an independent DataCo.<sup>25</sup> First, the conversion apparently can be triggered unilaterally by Bell Atlantic/GTE without any approval required by DataCo. It does not appear that Bell Atlantic/GTE pays a dime at the time of conversion although it moves from a so-called minority to a controlling position in the company.

There also does not appear to be a well-defined time limitation on the conversion right. Although Bell Atlantic and GTE state that the proposal requires that the conversion rights be exercised within five years of the merger closing, they state further that if the merged entity has failed to receive “sufficient interLATA relief to operate” DataCo, the merged entity will either sell its stock, which includes the conversion rights, or “exercise the conversion rights” to dispose of its interest in DataCo or “any assets that are prohibited to Bell Atlantic/GTE under section

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<sup>23</sup> See, e.g., Supplemental Filing at 36-42.

<sup>24</sup> See, e.g., 47 C.F.R. § 101.1003 (defining “controlling interest” in the context of Fixed Microwave Services, Local Multipoint Distribution Service as “any means of actual working control (including negative control) over the operation of the entity, in whatever manner exercised”).

<sup>25</sup> NEXTLINK notes that the proposal to create DataCo is only superficially described by Bell Atlantic and GTE in their Supplemental Filing. Bell Atlantic and GTE did not include any formal documentation or a detailed proposal or description of how the merged entity’s conversion rights will be exercisable or exercised. Notwithstanding Bell Atlantic’s and GTE’s cursory description of the proposed transaction, which the Commission should presume to be presented by Bell Atlantic and GTE in a light most favorable to Bell Atlantic and GTE, the proposed creation of DataCo should be rejected, because the transaction serves simply to circumvent the Act.

All these features would give Bell Atlantic/GTE a costless “call” on eighty (80%) percent of DataCo's stock that would allow Bell Atlantic/GTE to warehouse the DataCo assets until such time as Bell Atlantic/GTE chooses to exercise its control rights. Even at the end of the five-year period mentioned by Bell Atlantic and GTE, the merged entity will be able to select a buyer or exercise its conversion right in a manner that provides full payment of such right to the merged entity.

Because of its conversion right, the merged Bell Atlantic/GTE entity will be viewed as the putative owner of DataCo by DataCo employees, potential DataCo investors, and the world at large. To meaningfully evaluate the DataCo proposal, the Commission must view this call, as the financial markets would, as having been fully exercised by Bell Atlantic/GTE. There is ample Commission precedent for this view. For instance, in analyzing whether bidders in its Personal Communications Services auctions qualified as designated entities, the Commission's regulations provide for purposes of calculating equity held in an applicant or licensee, certain stock interests, such as stock options or conversion rights, will generally be treated as if the rights thereunder already have been fully exercised.<sup>27</sup> Given the fact that Bell Atlantic's and GTE's proposal permits the merged entity unlimited ability preserve its right to eighty (80%) percent ownership, the Commission should consider Bell Atlantic and GTE to possess well above the permissible ten (10%) percent ownership.

In addition, under the proposal as outlined in the Supplemental Filing, the merged Bell

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<sup>26</sup> Supplemental Filing at 33.

<sup>27</sup> 47 C.F.R. § 24.709(b)(7).



Atlantic/GTE entity will possess extraordinary rights that when considered in their entirety amount to de facto control of DataCo.<sup>28</sup> The merged Bell Atlantic/GTE entity has the right to vote on and approve, among other items: mergers; authorization of additional stock; issuance of shares; and material changes in the nature or scope of DataCo's business.<sup>29</sup> Further, the consent of the merged Bell Atlantic/GTE entity is required for, among other actions: agreements or arrangements that materially affect DataCo's operations; arrangements with employees that would require payments upon exercise of the merged entity's conversion rights; and acquisitions or joint ventures in excess of \$500 million in the aggregate in any 12-month period.<sup>30</sup>

In essence, the merged Bell Atlantic/GTE entity possesses veto power for any important business decision made by DataCo, including business agreements and executive compensation. The control reserved by Bell Atlantic and GTE permits very little room for DataCo to make independent business decisions. This type of arrangement clearly provides Bell Atlantic and GTE with more control over DataCo than can be permitted under the Act. By maintaining such close control, Bell Atlantic will be able to preserve its ability to restrict competition in its local

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<sup>28</sup> Bell Atlantic and GTE attempt to mask the unusual control and power that the merged entity will retain over DataCo by referring to the rights and powers as "reasonable investor safeguards." Supplemental Filing at 34.

<sup>29</sup> See Supplemental Filing at Schedule A. The merged entity retains additional rights to approve by a class vote of Class B shareholders: (1) consolidation or sale of assets; (2) bankruptcy or liquidation; (3) amendments to the Charter or certain by-law provisions that affect the rights of Class B shareholders; and (4) any action that would make it unlawful for the merged entity to exercise its conversion rights.

<sup>30</sup> *Id.* Consent of the merged entity is also required for: (1) agreements that bind or purport to bind the merged entity or any of its affiliates; (2) declaration of extraordinary dividends or other distributions; (3) dispositions within the first two years and thereafter dispositions in excess of \$50 million individually or \$250 million in the aggregate in any 12-month period; and (4) the incurrence, in any annual period, of indebtedness that exceeds the debt level for that period anticipated in the prospectus for the initial public offering of DataCo by the lesser of (i) 20% of such anticipated debt level and (ii) \$500 million.

markets and in DataCo's telecommunications services market.

Further, as detailed in Schedule B, DataCo will enter into commercial contracts with the merged entity, including contracts for marketing and contracts for administrative support services such as billing and collections, procurement, employee benefits support, treasury services, information technology support and real estate.<sup>31</sup> Moreover, DataCo will be able to: (1) obtain loans from the merged entity; (2) contract with the merged entity for R&D support; (3) enter into cross-licensing agreements for intellectual property; and (4) contract with the merged entity for network capacity and support functions, including volume purchase commitments.<sup>32</sup>

In examining the issues presented in the DataCo proposal, the Commission should conduct the type of review it performed in deeming unlawful the joint marketing arrangements entered into by U S WEST and Ameritech with Qwest Communications.<sup>33</sup> In its Order declaring those arrangements unlawful, the Commission considered many factors and noted that such arrangements would afford U S WEST and Ameritech with a "significant jumpstart" when they do obtain Section 271 authority.<sup>34</sup> Given the extraordinary control the merged entity will exercise over DataCo's business and operations, that jumpstart is equally evident in the DataCo proposal.

In addition, in the *Qwest Order*, the Commission focused further on the fact that the BOCs in question would exercise "strong prospective influence over the prices, terms, and conditions" of the services offered by Qwest. Similarly, given the extensive and broad list of

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<sup>31</sup> See Supplemental Filing at Schedule B.

<sup>32</sup> *Id.*

<sup>33</sup> See *supra* n.19.

“investor safeguards” reserved for Bell Atlantic and GTE, the merged entity in this proceeding would exercise similar strong control over the offerings of DataCo.

Just as it did not limit itself to the face of the contracts in question in ruling unlawful the Qwest arrangements, the Commission should not focus solely on the superficial contractual terms outlined by Bell Atlantic and GTE. Rather, the Commission should delve deeper to determine the anti-competitive effects underlying the DataCo proposal. NEXTLINK believes the Commission will conclude that the true value of the merged Bell Atlantic/GTE’s interest in and control of DataCo is so great that if approved, the arrangement will eviscerate the Bell Atlantic’s incentive to meet the market-opening requirements of Section 271.

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<sup>34</sup> *Id.* ¶ 41.

### III. CONCLUSION

The proposed creation of DataCo as outlined in the Supplemental Filing will permit Bell Atlantic and GTE to circumvent the market-opening requirements of Sections 251 and 271 of the Act. The DataCo proposal represents more of the legal gamesmanship consistently employed by Bell Atlantic in its ongoing effort to stymie competition and avoid complying with the Act. The Commission should approve nothing less than full divestiture of GTE's long distance business, including all interLATA advanced telecommunications services, in the Bell Atlantic region.

Respectfully submitted,

NEXTLINK COMMUNICATIONS, INC.

\_\_\_\_\_/s/\_\_\_\_\_  
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Counsel for NEXTLINK Communications, Inc.

Dated: February 15, 2000

## CERTIFICATE OF SERVICE

I, R. Dale Dixon, hereby certify that a true copy of the foregoing "COMMENTS OF NEXTLINK COMMUNICATIONS, INC." was served this 15th day of February, 2000, by electronic filing or by first-class United States Mail, postage prepaid, upon each of the following persons:

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